Supreme Court, U.S.
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No. 98-1600

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

ROBERT W. "BOBBY" UNSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION, INC. IN SUPPORT OF PETITIONER

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INTRODUCTORY STATEMENT

This brief is submitted in support of the petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit in *United States v. Robert W. "Bobby" Unser*, 165 F.3d 755 (10th Cir. 1999)[1,2].

This case involves interpretation of 16 U.S.C. §551, which authorizes the Secretary of Agriculture to make provisions for the protection of public forests and national forests and to make rules to regulate their use and occupancy and to preserve the forests from destruction, and makes a violation of the section punishable by fine or imprisonment. This case also involves the interpretation of 16 U.S.C. § 1133(c), which prohibits, inter alia, use of motor vehicles or motorized equipment or other form of mechanical transport in national forests. This case also involves 36 C.F.R. § 261.16(a) which prohibits in a National Forest Wilderness possessing or using a motor vehicle or motorized equipment (except as authorized by Federal Law or regulation).

Robert W. "Bobby" Unser was charged with and convicted in the United States District Court for the District of Colorado of unlawful possession and operation of a motor vehicle within a National Forest Wilderness area in violation of 16 U.S.C. §551 and 36 C.F.R. § 261.16(a). His conviction was upheld by the United States Court of Appeals for the Tenth Circuit in a decision dated January 4, 1999, reported in *United States v. Robert W. Unser*, 165 F.3d 755 (10th Cir. 1999). The Tenth Circuit affirmed the District Court's holding that violation of 16 U.S.C. § 551

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[1] Letters from petitioner consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or its counsel.

and 36 C.F.R. § 261.16(a) is a "public welfare offense" and that the prosection therefore did not have to prove *mens rea*[3].

Amicus respectfully urges the Court to grant the petition for a writ of certiorari.

INTEREST OF *AMICUS*

Atlantic Legal Foundation ("ALF") is a not-for-profit public interest legal foundation whose mandate includes the advocacy in the courts of principles of private enterprise and the mechanism of the market economy, limited and responsible government and opposition to unnecessary interference by government with individual rights.

Atlantic Legal Foundation argues that the Tenth Circuit ignored the limitations articulated by this Court on inferring Congressional intent to eliminate *mens rea* as an element of a crime and the importance, also recognized by this Court, of limiting the "public welfare offense" exception to the requirement of proving *mens rea*.

The appearance of Atlantic Legal Foundation as *amicus curiae* in this case is desirable because we provide the Court with a public policy perspective on the dangers of loosely construing Congressional intent and broadening the scope of the "public welfare offense" exception to the requirement of proving *mens rea*.

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[3] The Tenth Circuit also held that the District Court did not err in ruling that the defendant had the burden of proof with respect to the necessity defense. We do not address that issue.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE TENTH CIRCUIT RULING THAT VIOLATION OF 16 U.S.C. § 551 IS A "PUBLIC WELFARE OFFENSE" IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN *STAPLES V. UNITED STATES.*

We respectfully submit that the Tenth Circuit's holding on the *mens rea* issue in this case is, by any fair reading of *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), in direct conflict with the jurisprudence of the Court.

The Government has argued, and the Tenth Circuit held, that this case fits in a line of precedent concerning what has been termed "public welfare" or "regulatory" offenses, in which Congress is said to have imposed a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal. In construing such statutes, this Court has held that it is permissible to infer from statutory silence that Congress did not intend to require proof of *mens rea* to establish an offense.

For example this Court has held that the Narcotic Act of 1914, which was intended to minimize the spread of addictive drugs by criminalizing undocumented sales of certain narcotics, required proof only that the defendant knew that he was selling drugs, not that he knew the specific items he had sold were "narcotics" within the ambit of the statute. See *United States v. Balint*, 258 U.S. 250 (1922). Similarly, in *United States v. Freed*, 401 U.S. 601 (1971) this Court held that possession of hand grenades was a "public welfare offense" that did not require proof of *mens rea*.

However, such public welfare offenses have been created by Congress, and recognized by this Court, in "limited circumstances." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978). Typically, these statutes and the cases recognizing such offenses involve regulation of harmful or injurious items, such as drugs or "obnoxious waste materials". *See United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565 (1971). In finding

or approving the use of the "public welfare offense" exception, this Court has relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with the *mens rea* requirement. See *Morissette v. United States*, 342 U.S. 246, 244-248[4].

Staples involved a semiautomatic rifle that could be converted to full automatic fire relatively easily (and had in fact been so converted). This Court held that guns were not the sort of inherently dangerous device that put gun owners on notice that they must determine at their hazard whether their weapons come within the scope of a law that criminalized the possession of certain types of guns. We submit that if guns are not inherently dangerous devices, *a fortiori* snowmobiles cannot be considered the sort of dangerous device or substance which puts its owner or operator "on notice" that something analogous to "strict liability" adheres to its possession or use[5].

Snowmobiles are not "deleterious devices or products or obnoxious waste materials," *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971) that put their owners on notice that they stand

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[4] In describing the parameters of public welfare offenses, this Court has required at least that the defendant know that he or she is dealing with some dangerous or deleterious substance, so as to avoid "construing criminal statutes to impose a rigorous form of strict liability." See *Staples*, 114 S.Ct. at 1798, fn3.

[5] While we are aware that the Court has pointed out that the term "strict liability" is really a misnomer (see Staples. 114 S.Ct. at 1798, fn3), we use that term because it is more commonly understood by laymen who are likely to run afoul of such laws than are the Latin terms "*mens rea*" or "*scienter*."

in responsible relation to a public danger." *United States v. Dotterweich*, 320 U.S. 277, 281 (1943)[6].

As this Court wisely wrote in *Staples*, if we were to accept as a general rule the government's suggestion that dangerous or regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results.

Here, however, the government cannot argue that even if the item -- a snowmobile -- is inherently innocuous, the activity in which Unser and his friend were engaged somehow endangered public health or safety because of the manner in which they were using the device. Very significantly, in this case, the government has conceded that the conduct in question does not seriously threaten a community's health or safety: it stated in its brief below:

> Admittedly, it is difficult [to] characterize the use of motorized vehicles in a wilderness area as conduct "that may seriously threaten a community's health or safety."

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[6] The Tenth Circuit's holding cannot even be squared with the *dissent* in *Staples*. In that case, Justice Stevens recognized the requisites for finding a "public welfare offense" exception:

> "Public welfare" offenses share certain characteristics: (1) they regulate "dangerous or deleterious devices or products or obnoxious waste materials," (2) they "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare," and (3) they "depend on no mental element but consist only of forbidden acts or omissions." Examples of such offenses include Congress' exertion of its power to keep dangerous narcotics, hazardous substances, and impure and adulterated foods and drugs out of the channels of commerce.

Staples, 511 U.S. at 628-629 (citations and footnotes omitted). Those three criteria are conjunctive, and clearly the use of a snowmobile simply does not satisfy two of the three criteria.

Brief of United States below at 14 (quoting *Liparota v. United States*, 471 U.S. 419, 433 (1985). *See United States v. Unser*, 165 F.3d 755, at 763 (10th Cir. 1999).

Here, there can be little doubt that, as in *Liparota*, the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state -- ignorance of their precise location with reference to the boundaries of a national forest -- makes their actions entirely innocent.

As this Court held in *Staples*, it is unthinkable, and we submit dangerous to conclude, that Congress intended to subject law-abiding, well-intentioned citizens to possible imprisonment for a commonplace and apparently innocent and activity.

II. THE DOCTRINE OF "PUBLIC WELFARE OFFENSE" SHOULD BE NARROWLY CONSTRUED

As this Court noted in *Staples*, the obvious effect of eliminating the *mens rea* requirement is to make it easier for the prosecution to obtain a criminal conviction. 511 U.S. at 615; citing *Morissette*, 342 U.S. at 263. This Court has quite rightly been reluctant to impute that purpose to Congress where, as here, it would ease the path to convicting persons whose conduct would not alert them to the probability of strict regulation in the form of a statute such as 16 U.S.C. § 551.

In *Staples*, this Court held that when a statute is silent with respect to Congressional intent to dispense with the element of *mens re* or *scienter*, or when the language of the statute is ambiguous in that regard, "we must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded." *Staples*, 511 U.S. at 605. The requirement of proving *mens rea* is an essential principle of Anglo-American criminal jurisprudence. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978).

In *Morissette v. United States*, 342 U.S. 246, 250 (1952), this Court held that:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

These observations are important, and signal an appreciation for the dangers to liberty of permitting a loosening of the level of scrutiny the courts should employ in determining whether Congress intended to dispense with criminal intent as an element of a crime.

We submit that it is also important to note the risk in giving Congress license to create "public welfare offenses" as a means of social control. The Tenth Circuit, quoted the following from *Morissette*:

> While such [public welfare] offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent

> as dispensing with it and holding that the guilty act alone makes out the crime.

Morissette, 342 U.S. at 255-56.

This language, unless severely constrained to apply only to situations in which public health and safety are imminently and seriously threatened, make it all too likely that the legislative branch would, out of a desire to accomplish what it perceived to be an important social objective, "subject law-abiding, well-intentioned citizens" to possible imprisonment for commonplace and apparently innocent activities.

The notion that a comparatively mild penalty (such as a modest fine and a "short time" in prison") should be a significant consideration in determining whether the statute should be construed as dispensing with *mens rea* is pernicious. In examining the characteristics of the public welfare offense, this Court has included in its consideration the punishment imposed and have noted that the penalties commonly are relatively small, "and conviction does no grave damage to an offender's reputation." *Morissette*, 342 U.S., at 256, 72 S.Ct., at 246. In *Staples*, this Court noted that the crime was a felony, a term that has a particularly odious meaning. *Staples*, 511 U.S. at 617-618.

We respectfully submit that the Court should take notice of the fact that even conviction on a federal misdemeanor charge carries with it a severe burden. Such a conviction will likely impede, if not prevent altogether, gaining or changing employment, or obtaining credit (such as a mortgage, bank loan or credit card), essential life activities[7]. While there surely is a difference between five years imprisonment and six months jail time, prison conditions are such that it is not unreasonable to anticipate that an "ordinary law-abiding, well-intentioned citizen" could be abused and traumatized by even the "relatively small," penalty of a short

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[7] Many employment applications ask whether the applicant has been convicted of a "crime," and do not differentiate between a "felony" or a "misdemeanor." Many credit applications as the same question, make no distinction between the severity of the crime.

prison sentence and that a conviction of any crime "gravely besmirch[es}" the defendant's reputation. *Cf. Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960).

The common law was, in the absence of a written constitution, an Englishman's protection against tyranny. We have improved upon the English model, but common law tradition remains a bulwark against prosecutorial abuse or excessive enthusiasm.

As this Court noted in *Morissette*, and restated in *Staples*, the principle of requiring *mens rea* as an element of criminal conviction and punishment "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

We respectfully submit that this Court should take the opportunity presented by this petition for certiorari to reiterate those important principles of individual liberty and responsibility.

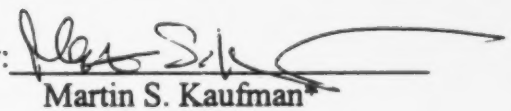
CONCLUSION

For the foregoing reasons, we urge the Court to grant the petition for a writ of certiorari.

Dated: April, 1999

Respectfully submitted,

Atlantic Legal Foundation, Inc.

By: 

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